Supreme Court, U.S.
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No. 92-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOEL M. BERGER,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBOL as Commissioner of Education of the State of New York,

Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents' brief in opposition errs on 3 levels: jurisprudentially, constitutionally, and historically.

Respondents' jurisprudential errors concern the policy reasons for granting certiorari. Sup.Ct.R. 10. The constitutional errors concern the constitutional merits of petitioner's claim. Respondents' historical errors concern the underlying facts.

Respondents' errors will be addressed seriatim:

1. Jurisprudential errors in brief in opposition—respondents fail to address the serious differences among the State Supreme Courts and federal circuits

Respondents completely ignore the serious differences among the State Supreme Courts and federal circuits in applying the Due Process right to notice in administrative disciplinary proceedings. It has been 25 years since this Court addressed the issue in a comprehensive fashion. *In re Ruffalo*, 390 U.S. 544 (1968). In the intervening quarter of a century, the States and U.S. Courts of Appeals have applied the Due Process right in increasingly divergent and inconsistent fashions. Petitioner highlighted these inconsistencies among the States and federal circuits, with extensive citations (*see* pet. at 21-24).

Respondents failed to address this in any way. Instead, respondents offered a cursory and cryptic 1-sentence rejoinder that the cited cases stand for "the proposition that adequate notice is a requirement of due process" (resp.br. at 5-6). This is a meaningless response to the detailed description of the numerous inconsistencies which have arisen among the States/federal circuits (pet. at 21-24).

Respondents failed to address the divergent State cases (pet. at 21-24). The cases show the need for renewed guidance from this Court, to foster consistency among the States after 25 years under *Ruffalo* (pet. at 21-24).

Nor did respondents address this Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (discussed in pet. at 25-26). Petitioner pointed out that *Zauderer* left unanswered numerous questions under the Due Process right to notice – that *Zauderer* devoted less than 2 pages to the Due Process/notice issue in a lengthy opinion which focused on other issues, primarily attorney-advertising and the First Amendment (pet. at 25-26). The unanswered questions in the wake of *Zauderer*, together with the numerous inconsistencies in applying the right among the States (pet. at 21-24), highlight the need for authoritative guidance now, for the first time in 25 years since *Ruffalo*.

Respondents did not mention *Zauderer*, nor the numerous issues which it left unanswered (pet. at 25-26), nor the inconsistencies among the States in applying the Due Process right to fair notice (pet. at 21-24).

2. Constitutional errors in brief in opposition — respondents make conclusory quotations from the decision below without addressing its departure from the formal charges

Respondents fail to compare the formal charges with the ultimate conviction. Instead, respondents quote from the conclusory language of the N.Y. Appellate Division's opinion without referencing its departure from the formal charges or from the prosecutor's opening statement at trial (resp.br. at 4-5). Indeed, respondents do not even cite the formal charges or prosecutor's opening statement anywhere in their brief in opposition. *See* resp.br. failing to cite formal charges (A.20-24) or prosecutor's opening at trial (A.25-26).

The reason is obvious. Such a comparison would show the denial of petitioner's right to fair notice of the charges. This is because:

– the formal charges focused on the bona fides of testing for oral mercury and of removing mercury dental fillings for health reasons (A.20-24),

and similarly:

- the prosecutor's opening statement at trial also focused on the bona fides of removing mercury fillings for health reasons (A.25-26);

BUT:

- the conviction of petitioner expressly avoided this issue (A.13,15) ("we do not pass upon the medical issue of whether . . . fillings containing mercury are harmful to the human body and should be removed"),

and instead:

- the conviction was based upon petitioner's failure to call a medical doctor for the specific patient J.H. "given this patient's [fragile] medical history" (A.13,15) – an issue never mentioned in the formal charges (A.20-24) nor in the prosecutor's opening at trial (A.25-26).

Respondents failed to cite or address the formal charges or prosecutor's opening statement at trial, because to address them would underscore the conviction's divergence from them.

Respondents argue that petitioner allegedly had notice of the basis of conviction (J.H.'s need for a medical doctor) because the issue was addressed at trial (resp.br. at 5). But respondents fail to mention – and do not dispute – that this issue was mentioned only cursorily in 4 pages at trial, within a 732-page trial transcript. There was no indication that these 4 pages were the basis of the charge, nor any attempt to amend the charge nor to alert petitioner to it. These 4 pages were admitted into the record because of the liberal rules of evidence at the hearing. N.Y.Educ.Law § 6510(3)(c) ("The [hearing] panel shall not be bound by the rules of evidence"). There was no indication that this was the basis of the charge, until the Regents Review Committee report (intermediate review level) 2 years *after* the trial was over (A.13,15). *See* pet. at 17-18.

There is no way that petitioner had "fair notice of the charge". *In re Ruffalo*, *supra*, 390 U.S. at 550 (1968).

3. Historical errors in brief in opposition — respondents misstate the underlying facts without citation to the record

Contrary to respondents' brief, the patient *did* complain of a dental problem (resp.br. at 2). The patient came to petitioner (a dentist) and specifically requested that petitioner remove her mercury-amalgam dental fillings for health reasons. The scientific literature supports this (*see* A.33-37). Dentists remove mercury fillings all the time for numerous reasons – aesthetics, deterioration, mercury danger, etc. This patient came to petitioner, *requesting* a dental procedure. The testimony shows this:

> A: [Patient] J.H. called the office to make an appointment. . . . She was not interested in coming to see the hygienist. . . . [T]his patient was only interested in coming to be tested for mercury and to have her [mercury] fillings changed.

(Trial transcript at 659).

Respondents offer no citation to the contrary (resp.br. at 2). There is no contrary evidence. Respondents' representation – that "[t]he patient did not complain of a dental problem" (resp.br. at 2) – is not supported by the record.

Next, respondents claim that petitioner told the patient the mercury content of her mouth was normal (resp.br. at 2). This is not true. Petitioner measured the mercury-vapor content of the patient's mouth and found it to be extremely high. The testimony is as follows:

> A: [O]n the left side [of her mouth] the mercury vapor was 129 micrograms per cubic meter; and on the right side even higher, 159 micrograms per cubic meter. . . .
>
> Q: What did these figures of 159 and 129 mean to you?

A: These were high numbers compared to what I had seen in the population in general. It also indicated that J.H. was being exposed to large amounts of mercury [from her dental fillings]. . . .

Q: Now, when you said this was higher than normal, what would you consider to be a normal range in the population?

A: Normal is zero. However, average [for] . . . people who are releasing [mercury] from their fillings . . . would be around 40 or 50.

Q: So this was much larger than that number . . .?

A: Much larger.

(Trial transcript at 675-77).

Respondents are flat-out wrong in representing that petitioner supposedly told the patient that her mercury content was normal (resp.br. at 2). The record shows the contrary.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, this Court should grant certiorari.

There are serious differences among the States and federal circuits in applying the Due Process right to notice in administrative disciplinary proceedings, which have arisen in the 25 years since *Ruffalo* (pet. at 21-26), which warrant the exercise of this Court's certiorari jurisdiction, to give uniform guidance to the jurisprudence of fair notice in these proceedings.

Dated: New York, New York
March 23, 1993

Respectfully submitted,

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